IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
CYRUS II, LP.,	§	**CASE I, 05-39857-H1-7**
BAHAR DEVELOPMENT, INC., and	§	**(Jointly Administered) MONDONA**
RAFIZADEH	§	
Debtors.	§	**Chapter 7**
	§	
	§	
RODNEY D. TOW,	§	
AS THE CHAPTER 7 TRUSTEE FOR	§	
CYRUS II, L.P., ET AL.,	§	
	§	
Plaintiffs	§	**ADVERSARY PROCEEDING**
	§	**No. 07-03301**
SCHUMANN RAFIZADEH, ET AL.,&	§	
	§	
Defendants.	§	

DEFENDANT UNIVERSAL SOURCING, LLC'S AMENDED RESPONSE TO MOTION TO COMPEL AND MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT THEREOF

COMES NOW Defendant Universal Sourcing, LLC ("Universal Sourcing") in the above-captioned adversary proceeding and files its Amended Response to Motion to Compel and Motion for Protective Order and Brief in Support Thereof, as follows:

I. SUMMARY OF ARGUMENT

Universal Sourcing will produce responsive documents ten days prior to the deposition of Universal Sourcing's corporate representative, Vafa Motlagh, a resident of China. Universal Sourcing files this motion, and brief in support thereof, to protect Mr. Motlagh from Plaintiffs' stated intention to serve him individually, and as the representative of Wellspring Sourcing, if he appears for deposition in the United States. Because Universal Sourcing's principal place of business is also in China, Universal Sourcing requests that this Court exercise its discretion and order that Mr. Motlagh not be deposed in America. Alternatively, if Mr. Motlagh is deposed in America, Universal Sourcing requests that this Court exercise its discretion to issue an order precluding Plaintiffs, or its agents, from serving Mr. Motlagh, in any capacity, for a period from 48 hours before to 48 hours after his deposition.

II. BACKGROUND FACTS

1. On October 30, 2007, this Court granted Plaintiffs' motion for leave to file a verified supplemental complaint adding Universal Sourcing as a Defendant and entered a temporary restraining order, which froze Universal Sourcing's Ameritrade assets. Plaintiffs also added Vafa Motlagh, a Chinese resident, and Wellspring Sourcing, Inc., a Chinese corporation, as defendants in its verified supplemental complaint. Both Universal Sourcing and Wellspring Sourcing, Inc. are solely operated in China by Mr. Motlagh, who is also the sole owner of both companies.

2. On November 19, 2007, upon agreement of the parties, this Court extended the temporary restraining order until the time of trial, which is currently set for May 8, 2008. On December 3, 2007, upon agreement of the parties, this Court extended Universal Sourcing's responsive pleading deadline until the earlier of January 3, 2008 or five days before the deposition of Universal Sourcing's corporate representative (Mr. Motlagh). On December 5, 2007, Plaintiffs filed their Supplemental Brief and Authorities in Support of Plaintiffs' Motion to Compel Discovery from Defendant Universal Sourcing as a maneuver to lure a Chinese individual and a Chinese corporation into America to be served with process. In response, Universal Sourcing files this brief and Motion for Protective Order.

III. ARGUMENT AND AUTHORITIES

3. "Rule 26 [of the Federal Rules of Civil Procedure] vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery." *Crawford-El v. Britton*, 523 U.S. 574, 598-99 (1998). Upon motion, "the court may limit the time, place and manner of discovery … 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Id.* (citing Fed. R. Civ. P. 26(c)). Significantly, the court has discretion to designate the location of a witness' deposition. *Farquhar v. Shelden*, 116 F.R.D. 70, 72 (E.D. Mich. 1987).

A. Because Universal Sourcing's principal place of business is in China, this Court should exercise its discretion to order that the deposition of Universal Sourcing's corporate representative take place outside of America.

4. "It is well settled that '(t)he deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business,' especially when … the corporation is the defendant." *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) (citing 8 C. Wright and A. Miller, Federal Practice & Procedure s. 2112 at 410 (1970)). Similarly, when a deponent lives a great distance from the deposing party, the deposition takes place near the location of the out-of-state deponent. *O'Sullivan v. Rivera*, 229 F.R.D. 187, 189 (D.N.M. 2004); *Metrex Research Corp. v. United States*, 151 F.R.D. 122 (D. Colo. 1993). When a plaintiff seeks to depose the defendant at a location away from its principal place of business, the plaintiff has the affirmative burden of demonstrating peculiar circumstances which compel the court to order the deposition be held in an alternate location. *See Morin v. Nationwide Federal Credit Union*, 229 F.R.D. 362, 363 (D. Conn. 2005).

5. The Fifth Circuit employs the "total activity" test determine a corporation's principal place of business. *See J.A. Olson Co. v. City of Winona, Miss.*, 818 F.2d 401 (5th Cir. 1987). The "total activity test" incorporates both the "nerve center" test and the "place of activity" test and is employed when a corporation's management (nerve center) is located in one jurisdiction while its operations and activities are located in a different jurisdiction. *Id.* Conversely, when a corporation's management and operations are located in the same jurisdiction, no test is required to determine the principal place of business because the principal place of business is undisputed. *See id.* A corporation's place of incorporation, taken alone, has no bearing on the determination of the corporation's principal place of business. *See Village Fair Shopping Center v. Sam Broadhead Trust*, 588 F.2d 431 (5th Cir. 1979). Further, when a corporation's operations in a jurisdiction are "passive" as opposed to "active," courts label the location of the corporation's nerve center, rather that its place of operations, as the principal place of business. *Id.* (holding that a Delaware corporation that conducted passive activity

[managing real estate] in California and Mississippi from its headquarters in New York had a principal place of business in New York).

6. Applying the Fifth Circuit's "total activity" test, China is, without question, Universal Sourcing's principal place of business. First, the fact that Universal Sourcing was formed in Nevada has no bearing on the analysis. *See Village Fair Shopping Center*, 588 F.2d at 431. Second, Mr. Motlagh, who resides and works in China, *is* Universal Sourcing's "nerve center." (Ex. A – Decl. of Vafa Motlagh, ¶¶ 1-3). Despite Plaintiffs' implication that Ms. Azita Berglund was part of Universal Sourcing's "nerve center," since Universal Sourcing was formed, Mr. Motlagh has been its sole manager and owner. (Ex. A – Decl. of Vafa Motlagh, ¶¶ 1-3). Plaintiffs have no evidence that Ms. Berglund was ever an employee of Universal Sourcing. In fact, Universal Sourcing has never had any employees in America. (Ex. A – Decl. of Vafa Motlagh, ¶ 2).

7. Next, Universal Sourcing has no active operations in Nevada or Texas or any state in America. (Ex. A – Decl. of Vafa Motlagh, ¶ 2). Universal Sourcing maintains a private mailbox in Nevada and has an Ameritrade investment account (formerly a Schwab investment account) registered to the same private mailbox. (Ex. A – Decl. of Vafa Motlagh, ¶¶ 1-2). If Plaintiffs contend that the private mailbox address referenced on the Schwab and Ameritrade checks represents Universal Sourcing's principal place of business, this contention has no basis in law. At most, Universal Sourcing's private mailbox address in Nevada and its Ameritrade investment account amount to passive operations. Otherwise, Universal Sourcing has no other active or passive operations in Nevada; Houston, Texas; or elsewhere in America. (Ex. A – Decl. of Vafa Motlagh, ¶ 2). Thus, applying *Village Fair* and *J.A. Olson, Co.*, China is Universal Sourcing's principal place of business because it's the company's "nerve center" and because the company's operations in America, if any, are passive. Because Universal Sourcing's principal place of business is China, the deposition of its corporate representative, Mr. Motlagh, should be taken in or near China. See *Upjohn Co.*, 593 F.2d at 651; *Metrex Research Corp.*, 151

F.R.D. at 122. To alleviate potential concerns with counsel traveling to China, Mr. Motlagh is agreeable to being deposed in Hong Kong or Vancouver, British Columbia.

8. With Mr. Motlagh's willingness to be deposed in a jurisdiction other than China or America, Plaintiffs cannot carry their burden of setting forth peculiar circumstances required to move the deposition to Nevada or Houston. Plaintiffs' apparent disdain for Mr. Motlagh's choice to locate Universal Sourcing's nerve center and operations in China does not qualify as a peculiar circumstance. While Plaintiffs cite travel costs and convenience as reasons for deposing Mr. Motlagh in Nevada or Houston, these too do not qualify as peculiar circumstances. *See, e.g., Dagen v. CFC Group Holdings, Ltd.*, 2003 WL 21910861 (S.D.N.Y. 2003) ("While cognizant of the fact that travel between Hong Kong and New York is both costly and time-consuming, the court finds that plaintiff has failed to describe any peculiar reasons why the depositions should not take place at the deponent's location of residence [Hong Kong].").

9. Although Plaintiffs set forth no required "peculiar" circumstances for relocating Mr. Motlagh's deposition to Nevada or Houston, Plaintiffs have clearly set forth their desire to use the Universal Sourcing corporate representative deposition as a maneuver to serve Mr. Motlagh personally and as representative of Wellspring Sourcing. Because its principal place of business is located in China, this Court should prevent Plaintiffs' maneuvers to serve Mr. Motlagh by issuing a protective order setting Mr. Motlagh's deposition at a location outside America, preferably Hong Kong or Vancouver, British Columbia.

B. If this Court determines that Universal Sourcing's corporate representative's deposition should take place in America, this Court should exercise its discretion to preclude Plaintiffs from serving Mr. Motlagh in any capacity while in America for his deposition.

10. As stated previously, upon motion, "the court may limit the time, place and manner of discovery … 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Crawford-El v. Britton*, 523 U.S. 574, 598-99 (1998) (citing Fed. R. Civ. P. 26(c)). If this Court determines that Universal Sourcing's corporate

representative should be deposed in America, Universal Sourcing requests that the Courts use its broad discretion to issue a protective order preventing Plaintiffs, or their agents, from serving Mr. Motlagh, in any capacity, while in America.

11. Despite Plaintiffs' contention that Universal Sourcing's request for a protective order preventing service of process on Mr. Motlagh has no basis in law, the Southern District of New York recently granted such an order. *See Am. Int'l Tel., Inc. v. Mony Travel Svcs*, Inc., 203 F.R.D. 95 (S.D.N.Y. 2001). In *Mony*, the plaintiff sued the defendant corporation in New York. *Id.* Thereafter, the plaintiff amended its complaint to add another defendant, namely Mr. Duran, the defendant corporation's Florida-based president. *Id.* After failing to effect service on Mr. Duran, the court granted the plaintiff's motion to depose Mr. Duran in New York for the limited purpose of questioning Mr. Duran in regards to the personal service issue. *Id.*

12. Realizing that the plaintiff may use the deposition in New York as a maneuver to personally serve Mr. Duran with process in New York, Mr. Duran moved the court for a protective order preventing such service. *Id.* The court granted Mr. Duran's motion and ordered that "plaintiff is to make no attempts to serve Mr. Duran for 48 hours prior to the start of the deposition and for 48 hours after the conclusion of the deposition." *Id.* at 97.

13. Like Mr. Duran, Mr. Motlagh is concerned that Plaintiffs attempts to depose him in America are no more than a veiled maneuver to serve him with process. In fact, Plaintiffs have openly stated their intentions in its briefing to the Court. Therefore, if this Court determines that the deposition of Universal Sourcing's corporate representative should take place in America, Universal Sourcing requests that this Court issue a protective order preventing service on Mr. Motlagh, in any capacity, for a period from 48 hours prior to his deposition until 48 hours after his deposition.

IV. MOTION FOR PROTECTIVE ORDER

14. Universal Sourcing hereby moves the Court, under Rule 26(c)(2) of the Federal Rules of Civil Procedure, for a protective order setting Mr. Motlagh's deposition in a location outside of the United States of America, or in the alternative, if the deposition is set in America, for an order preventing Plaintiffs, or their agents, from serving Mr. Motlagh, in any capacity, for a period extending from 48 hours prior to his deposition until 48 hours after his deposition.

V. PRAYER

For the reasons stated above, Universal Sourcing respectfully requests that this Court grants its Motion for a Protective Order setting Mr. Motlagh's deposition in a location outside of America, or in the alternative, if the deposition is set in America, preventing Plaintiffs, or their agents, from serving Mr. Motlagh, in any capacity, while he is in America for his deposition.

Dated: December 14, 2007.

Respectfully submitted,

THOMPSON & KNIGHT, LLP

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ATTORNEYS FOR UNIVERSAL SOURCING, LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing instrument was filed electronically on December 14, 2007 in compliance with Local Rule LR5.3. As such, this notice was served on all counsel of record who are deemed to have consented to electronic service. Pursuant to Fed.R.Civ.P. 5(d) and Local Rule LR5.3, all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing instrument by U.S. First Class Mail and/or facsimile on the 14th day of December, 2007.

/s/ *Robert L. Paddock*
ROBERT L. PADDOCK